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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal with members of the bar, exclusively.

ASSIGNEES OF UNQUALIFIED FOREIGN CORPORATIONS

In The Corporation Journal for October, 1928, was reported a decision of the Supreme Court of Missouri to which was given the caption "Assignee of a special tax bill issued to a foreign corporation not licensed to do business in Missouri for street paving done there denied the right to enforce the same as a lien on the property covered by the tax bill." The court, in its opinion, said that "the plaintiff in taking the assignment of the tax bill from a corporation, was obliged to take notice of the legal limit of the powers of that corporation." In this issue, at page 302, is reported a decision of the Supreme Judicial Court of Massachusetts of like purport and of equal significance, wherein it is emphasized that the assignee stands in the shoes of the assignor and is in no better position to sue than is the unqualified foreign corporation.

CONGRESS

The Second Session of the 70th Congress convenes on Monday, December 3. Until a few minutes before noon on Monday, March 4, when the Congress adjourns sine die, the people of the country should be zealous in their watchfulness of what their representatives in the Senate and House are doing and trying to do. The Corporation Trust Company offers a satisfying medium to that end. See back cover page.

Kenneth Kerr Lawson

President.

THE CORPORATION JOURNAL

Edited by John H. Sears of the New York Bar

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The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special ring binder will be furnished at cost ($2) and thereafter before mailing, each copy will be punched to fit the binder.

Contents for December

STOCK DISTRIBUTION—GROWTH OF CORPORATIONS

In September, 1928, Joseph S. McCoy, actuary of the United States Treasury Department, made the statement that there were about 3,000,000 individuals in this country who own corporate securities. "The number of stockholders in the United States has increased materially since the war," Mr. McCoy said. "Business concerns have encouraged employes to buy stock in the concerns they work for on the theory that as stockholders they will take a greater interest in the business. The old theory that there are at least 15,000,000 stockholders in the United States was based on the outstanding amount of corporate securities, but investigations have shown that some individuals own as much as 500 different stocks." The 15,000,000 figure is employed in an article appearing in the New York Sun of November 9, 1928, which states in part: "With 15,000,000 men, women, and children owning stocks or bonds to-day, an even greater distribution of securities is anticipated by John Moody, president of Moody's Investors Service. 'More and more,' he said, 'the corporate industries of the United States are becoming the property of the public and more and more are individual citizens investing their wealth and their savings in corporate securities. In my view this new era in America is in its first stages only. The coming decade will witness its expansion and extension far beyond its present state. * * * Wealth production of almost every nature has gone into the corporate form and all industries are steadily changing into larger and larger corporate unities. Industries and methods which hardly existed or were in their infancy eight years ago are now becoming outstanding features in our economic life. Witness the marvelous development of the chain store and mail order movements, the astounding development of the motion picture and motor industries, the radio and aeronautical industries. With this vast broadening of corporate activities, the machinery for carrying on the business of the country has grown in equal ratio.' "

The daily experience of The Corporation Trust Company supports the observations of Mr. Moody. The machinery furnished by us has steadily been increased to meet the demands. Our files are becoming more and more crowded with documents incident to the incorporation of the industries enumerated. Corporate precedents keep pace with the new expansion.

Domestic Corporations

California.

Recovery in rescission of stock subscription contract. Plaintiff, in this action in rescission of stock subscription, into the merits of which it is unnecessary to go, alleged in the complaint that he tendered to the defendant corporation the shares covered by his subscription and "every other thing of value received by him in connection with such sale." He had received a $500 dividend. The foregoing allegation was admitted in the answer. The defendant contends that appellant cannot maintain the action because he did not offer to return the $500 dividend. In view of the admission the District Court of Appeal, First District, Division 2, California, reversing the judgment below for the defendant, says that the actual physical tender of the $500 is not an issue by the pleadings. Continuing the court says that in such a case it is not necessary to offer to return the dividend, for to do so would be an idle act since if plaintiff fails in his action he would be entitled to retain the dividend and if he succeeds he would be entitled to retain the amount as partial restoration of the price paid for the stock, judgment being entered for the difference, and the law does not require idle acts. De Garmo vs. Petitfils Confiserie, 269 P. 692. G. P. Adams, W. W. Orme, G. C. De Garmo, and H. B. Cornell, all of Los Angeles, for appellant. Gibson, Dunn & Crutcher, and H. F. Price, all of Los Angeles, for respondent.

Delaware.

Right to inspect corporation's books and records. The Supreme Court of Delaware (New Castle) holds that the petitioner, a stockholder in the defendant Delaware corporation, is entitled to the writ of mandamus prayed for to compel the company to allow him to inspect its books and records (at reasonable times and to the extent necessary for the accomplishment of the desired purpose only) in order to determine the value of the shares held by him. It was alleged, and not denied, that petitioner's repeated requests made at the company's statutory office in Wilmington, and at its principal place of business in Philadelphia, had been refused. The only provision of law relative to the right of stockholders to inspect the books is contained in § 29 of the General Corporation Law; this confers on them the right to inspect the original or duplicate stock ledger; this right was not denied petitioner. The defendant corporation's certificate of incorporation authorizes the directors to determine whether or not the stockholders shall have the right of inspection of the company's books, and if so, under what conditions. A by-law provides that stockholders may inspect the books, in the discretion of the directors "at such reasonable times as the board of directors may by resolution designate." The court says: "Under the common law a stockholder had the right to examine the books and records of the company, and that right could not be taken away except by a statute that expressly or by necessary implication authorized it.

There is no such statute, and we conclude that the provision in the certificate of incorporation of defendant company, under which the relator was denied the right to inspect the company's records, forms no part of its charter and should be disregarded." It was claimed that the charter provision is warranted by the eighth paragraph of section 5 of the General Corporation Law which provides that the certificate of incorporation may contain any provision the incorporators may choose to insert "creating, defining, limiting and regulating the powers of * * * the stockholders." These words, so it seems to the court, were not intended to give to the corporation the power to prevent *any* inspection of the books but rather to confer power to reasonably limit and regulate a power that the stockholder possesses. It was urged further that as the petitioner had never made application to the directors for the permission sought his petition should be denied but the court holds that he did all that he reasonably could be expected to do, and in fact all that he could do, probably, when he made demand in writing and in person on the president at the company's office in Philadelphia and on the company's resident agent at the Delaware home office. "It was the duty of the president or resident agent to submit the relator's demand to the directors." State ex rel. Cochran vs. Penn-Beaver Oil Co., 143 Atl. 257. Horace G. Eastburn, of Wilmington, for petitioner. H. H. Ward, Jr. (of Ward, Gray & Neary), of Wilmington, for respondent.

Georgia.

Stockholder is estopped to question action of directors ratified by vote of her stock by her proxy. It was voted to increase the capital stock of a corporation by 15,000 shares, 10,000 to be offered to shareholders at $10 per share and 5,000 to be offered at $15. By resolution of the executive committee the president was to be allowed to pay for his allotment "out of dividends." Appellant, here, purchased a block of the new stock at $15. Subsequently the resolution of the executive committee was read at a stockholders meeting and put to a vote for ratification. The right to vote the new stock issued to the president was challenged but sustained; in the vote on the resolution such stock held the balance of power and the resolution was sustained. Appellant's stock was voted by proxy for the resolution. At that time the appellant was not aware of the terms of the president's subscription. On learning such terms she brought this action in her own behalf and in behalf of other stockholders who might join with her to recover the value of or to cancel the shares issued to the president. The Circuit Court of Appeals, Fifth Circuit, affirms the decree below for the corporation on the ground that appellant is estopped to complain (although "the effect of the resolution was to give away stock to the president, and was therefore beyond the power of the directors"), because her "stock was voted to bring about the result complained of. She is bound by the act of her proxy, even though she had no personal knowledge of it, because he was her agent and she is chargeable with his knowledge." Gray vs. Aspironal Laboratories et al., 24 F. (2d) 97. Edgar Watkins and Mac Asbill, of Atlanta (Edgar Watkins, Jr., of At-

lanta, Ga., on the brief), for appellant. Walter T. Colquitt and Ben J. Conyers, of Atlanta (W. J. Laney, of Atlanta, on the brief), for appellees.

Michigan.

Non-compliance with Minnesota foreign corporation law by Michigan corporation no defense in action brought in Michigan court. It is not essential to go into the merits of this action which was brought by a Michigan corporation in a Michigan circuit court against one of its agents to recover damages for alleged fraudulent conduct on his part. The corporation was organized "to grow, purchase, and deal in sugar beets and to make sugar and other products therefrom and to sell and deal in such products." The agent was engaged in the sale in Minnesota for the corporation of Belgian stallions raised by the corporation on its Michigan lands, and owned by it. The Supreme Court of Michigan, on appeal, states that the record shows that the corporation was primarily engaged in the business for which it was organized and that the raising of other crops and the breeding of live stock was merely incidental thereto. The corporation admits that in selling its stallions in Minnesota it was doing business there and further admits that it had not qualified in Minnesota as a foreign corporation, but claims exemption under the provision of the Minnesota Foreign Corporation Act (§ 6208, Gen. Stat. of Minn., 1913); § 7495, 1923 Stats.) that qualification is not necessary in the case of corporations engaged, inter alia, in raising and improving live stock or in growing sugar beets. The court is of the opinion that the corporation is within the exemption, particularly as the business engaged in in Minnesota was an incident to the raising of live stock, but holds that this is immaterial since the defense of non-compliance by a Michigan corporation with the Minnesota foreign corporation law may not be urged in such an action as this in a Michigan court. Owosso Sugar Co. vs. Arntz, 221 N. W. 179. Charles H. Goggin, of Alma, and Smith, Hunter & Spaulding, of St. Johns, for defendant-appellant. Martin H. Carmody, of Grand Rapids, for plaintiff-appellee.

Missouri.

The preferences, priorities, etc., adhering to preferred stock as provided by the articles of incorporation may not be modified by by-law adopted before issuance of such preferred stock. In the instant case it was claimed that by virtue of a by-law in force prior to the issuance of preferred stock stated by its terms "to protect the preferred shareholders against loss" the purchasers of the preferred stock became creditors of the corporation, and that their status was that of preferred creditors. The by-law provided that the amount of standing timber belonging to the corporation must always equal its original holdings, or, in lieu thereof $2 per 1,000 feet of lumber cut must be placed in a sinking fund to be used by the directors in their discretion for the redemption of the $100 par value preferred stock at $105 plus accumulated 7 per cent per annum dividends. The United States Dis-

trict Court for the Western District of Missouri, stating that while it is true that calling one a preferred stockholder does not by itself put him in that class, in the instant case, by his bill, the plaintiff is without doubt a preferred stockholder, holds that "such a by-law would be insufficient to take away his character as a preferred shareholder and clothe him with the rights of a preferred creditor. Effective liens cannot be created in this way." Otherwise, by a simple by-law, a paramount lien on the corporation's assets might be created as to all subsequent creditors and mortgages thus nullifying the recordation laws of the State. Carl Metcalf vs. East Oregon Lumber Co. et al., not yet officially reported. (United States Daily, November 3, 1928.)

North Carolina.

Chain stores. In reporting the decision of the Circuit Court for Alleghany County, Maryland, in Keystone Grocery and Tea Co. vs. Huster, in The Corporation Journal for June, 1928, page 209, holding invalid the Maryland law prohibiting under heavy penalty more than five "chain stores" under one ownership in Alleghany County and imposing a heavy special license fee for each chain store of a group of five or less, we made reference to a North Carolina case wherein it was decided by the Superior Court of Lake County that the state law laying a special license tax on owners of six or more chain stores but relieving from the tax the owners of five or less chain stores is unconstitutional. The Supreme Court of North Carolina now affirms the lower court in the case thus referred to and holds the law to be violative of both the State and Federal constitutions, in that there is lack of uniformity, that the classification is arbitrary, unreasonable and unjust, and that the equal protection of the laws is denied. Great Atlantic and Pacific Tea Co. et al. vs. Doughton, Commissioner of Revenue of North Carolina, 144 S. E. 701. Dennis G. Brummitt, Atty. Gen. and Frank Nash and Walter D. Siler, Asst. Attys. Gen. for appellant. Sullivan & Cromwell, of New York City, and Tillett, Tillett & Kennedy, of Charlotte, for Great Atlantic and Pacific Tea Co. Pender, Way & Foreman, of Norfolk, Va., and McLean & Stacy, of Lumberton, for David Pender Grocery Co. Perry & Kittrell, of Henderson, for Rose's 5, 10 and 25 Cent Stores, Inc. Davies, Auerback & Cornell, of New York City, and Pou & Pou, of Raleigh, for F. W. Woolworth Co., Gwinn & Pell, of New York City, and Pou and Pou, of Raleigh, for J. C. Penny Co. Douglas, Armitage & McCann, of New York City, and Pou & Pou, of Raleigh, for G. R. Kenny Co., Inc. Murray Allen, of Raleigh, for Milner Stores, Inc., L. S. Hereford Co., Inc., and Guilford-Forsyth Grocery Co. W. C. Newland, of Lenoir, for Carolina Stores, Inc. Tillett, Tillett & Kennedy, of Charlotte, for L. B. Price Mer. Co. R. H. Sykes, of Durham, for M. Samuels Co.

Ohio.

Directors of insolvent corporation personally liable for judgment creditor's pro rata share of corporation's assets such assets having been used to pay another creditor in full with interest. The defen-

dant corporation was a one-man concern in the sense that its management was left entirely in the hands of its principal stockholder. When the corporation became insolvent and ceased business the settlement of its affairs was left in his hands. He used the assets to settle in full, with interest, the secured claim of a creditor bank leaving nothing for the unsecured plaintiff creditors. They brought this action against the company and all of its directors for their pro rata shares of the assets. The Ohio Court of Appeals for Hamilton County renders judgment for the plaintiffs saying that all of the directors knew or should have known of the insolvency of the corporation and invoking the trust fund rule stated in Star Hardware & Supply Co. vs. Toledo Steel Castings Co., 90 Ohio St. 171 to effect that in such cases the directors shall not satisfy the claims of secured creditors to the exclusion of unsecured creditors but shall "apply all of its property and assets to the payment of the corporation's debts in the order of their priority according to law." James C. Doherty et al. vs. Collier Shoe Co. et al. Ohio Law Bulletin and Reporter (1928), page 562. Simeon M. Johnson, for plaintiffs. Lorbach & Garver, for defendants.

Washington.

Equitable relief to minority stockholder alleging waste of corporate property and diversion of assets and profits. This is an action by a minority stockholder against a Washington corporation and certain of the trustees (directors) thereof "alleging waste of the corporate property and diversion of the assets and profits of the corporation, to his detriment as a stockholder," and seeking refunds to the corporation of alleged excess salary paid to the majority stockholder as manager and alleged excess rental paid to him by the corporation for realty owned by him, etc., etc. The plaintiff prevails in part. It is not essential to go further into the merits. The Supreme Court of Washington says: "The rights of minority stockholders are always favored with the particular regard of courts of equity. It is so easy by devious and insidious methods to appropriate an undue proportion of corporate revenue to the payment of high salaries, excessive rentals, and other corporate expenses, and it is so difficult to establish by a preponderance of the testimony that such expenditures are excessive, or for any reason improper, that courts scrutinize very closely the acts of corporate officers in directing expenditures which result either directly or indirectly in personal profit or advantage to a majority stockholder." Tefft vs. Schaefer, et al., 269 P. 1048. R. L. Edmiston, of Spokane, for appellant. Tusten & Chandler, of Spokane, for respondents.

Foreign Corporations

Delaware.

Presence in state of foreign corporation for purpose of conferring jurisdiction on state courts. The defendant, Viavi Co., is a Cali-

fornia manufacturing corporation. In an action against the company process was served, in Wilmington, Delaware, on an admitted agent of the Eastern Viavi Company, doing business in Delaware. The California company, on special appearance, moved to vacate return of process on the ground that neither the one on whom the process was served nor the Eastern Viavi Co., is its agent and that it is not engaged in business in Delaware. It was alleged, and was not denied, apparently, that the Eastern Viavi Company, an organization engaged in selling defendant's products, buying such direct from it, is an independent company having different directors and officers than those of the California corporation. However, it was shown that on containers of the California company's products and in printed matter relating to such products the Eastern Viavi Company is referred to as a "Great Division" of the California company which is designated as the home office, and its address is given as one of the "Division Headquarters" of the home office. In other general printed matter referring to the California company's products the public is invited to "address any Viavi office," the name and address of the Eastern Viavi Company appearing in such printed matter. In view of such and other like evidence the Superior Court of Delaware (New Castle) is "unable to view the relation of the Eastern Company to the California Company in any other light than that of agent" and finds that the defendant was "doing business in this State in such manner and to such extent as to warrant the inference that it was present here and subject to the local jurisdiction," and so denies the motion to vacate the return of process. Bell vs. Viavi Co., 143 Atl. 255. Clarence A. Southerland and E. Ennalls Berl, of Ward & Gray, both of Wilmington, for plaintiffs. Henry R. Isaacs, of Wilmington, for defendant.

Idaho.

Unlicensed foreign corporation doing business in Idaho is entitled to sue in the state courts on a contract involving interstate commerce only. One of the defenses pleaded in this action on a contract was that the plaintiff is a non-complying foreign corporation, and consequently could not maintain the suit. Plaintiff is a New Jersey corporation with its principal place of business in Minnesota. It is in the wholesale hardware business, selling to the retail trade. To the extent of the contract sued on "all orders were mailed to Duluth, Minn., and all goods were shipped into Idaho from outside states. * * * These were purely interstate commerce transactions. * * * Not a single item of intrastate commerce was suggested by the evidence." So says the Supreme Court of Idaho, and, continuing: "This court, in Bettilyou Home Builders Co. vs. Philbrick, 31 Idaho 724, 175 P. 958, in connection with this precise question, said: 'A fair construction of the statute leads to the conclusion that a contract or agreement which cannot be sued upon or enforced in any court of this State, under the prohibition of the statute, is one growing out of the "doing of business in this state" or so connected therewith as to be an element of such transaction. When the contract or agreement sued upon proves to be one which was made and performed outside of this state, the question as to

whether the foreign corporation was doing other business within the state is not material.' " It is held in the instant case that the trial court did not err in excluding the testimony, or in denying the offer of proof to the effect, that the respondent was, in other matters and with other parties, doing business in Idaho. Marshall-Wells Co. vs. Kramlich et al., 267 P. 611. Martin & Martin, of Boise, for appellants Kramlich and Mehlhaff. Paul Pizey and Delana & Delana, all of Boise, for respondent.

Massachusetts.

Defense of non-compliance is open in suit by assignee of unqualified foreign corporation's claim on a contract. A New York corporation carried out a construction contract in Massachusetts. It had not complied with the foreign corporation law of the commonwealth. A certain amount was alleged to be due the corporation on the contract. Its claim was assigned to the plaintiffs here, the assignment being found to have been "made in good faith upon valuable consideration and not for the purpose of evading the statute." Suit was brought by the assignee on the claim; the defendant filed a plea in abatement to the effect that as the assignor foreign corporation had not complied with the foreign corporation laws of the state (which provide, inter alia, that no action may be brought in the state courts by a non-complying corporation) the suit could not be maintained. In the Superior Court this plea was overruled, manifestly, so the Supreme Judicial Court (Hampden) says, on the ground that the assignees were not barred by the statute. The higher court sustains the exceptions brought by the defendant, saying that though section 5, General Laws, Chapter 231, provides that an assignee may bring suit in his own name on a non-negotiable legal chose in action it also provides that in such case the defendant shall have open to him any defense that would have been available had the action been brought in the name of the assignor, and that the clear intent of this is that the assignee shall stand in the shoes of the assignor, that he shall be in no better position than the assignor, that "the alleged debtor cannot be put in any worse condition than if the original contractor were suing in his own name and right," and holding that as the assignor could not have maitained the action the assignee is estopped from so doing. Lewis et al. vs. Club Realty Co., 163 N. E. 172. J. B. Ely and W. A. McDonough, both of Springfield, for plaintiffs. G. A. Bacon, of Springfield, for defendant.

New York.

Refusal of order for examination in New York of officer of an unqualified foreign corporation having no office or place of business in New York. In a certain action against an Illinois corporation application was made to the New York Supreme Court, Kings County, for an order directing the defendant corporation, by its president, to appear for examination before the court concerning certain issues raised by the pleadings therein. The court denies the motion for the order, saying, after stating that it appears that the corporation has its principal and only office in Chicago and that all of its officers are located

in Chicago, having no office in New York, "I must hold that a foreign corporation defendant, having no officer or office or place of business in this state, and, as I am informed, never having filed any certificate relative to such activities, will not be required at its own expense to bring its officers and records here for examination. If any such information is required the plaintiff herein should be required to obtain that by the usual methods under an open commission, the terms of which will be passed upon if such an application is sought." Silver King Ice-Skate Corporation vs. Athletic Shoe Co., New York Law Journal, October 4, 1928, page 78.

North Carolina.

On "doing business"; service of process. Action to recover damages on account of an alleged breach of contract. The defendant entered a special appearance and made a motion to vacate the service of summons and to dismiss the action on the ground that it is a foreign corporation not engaged in doing business in North Carolina and that the one on whom the process was served was not an officer or agent of the company on whom service could legally be made. The defendant, a New Jersey corporation, arranges for exclusive agency rights in a defined territory for the distribution of its products. Such an arrangement was made with the plaintiff to whom was given exclusive representation in North and South Carolina. Plaintiff sold for his own account the goods shipped to him, on his order, by defendant. The one on whom the process was served was a regular employee of defendant, a "department manager." He had frequently visited plaintiff and conferred with its manager. When service was made on him he was in North Carolina carrying on negotiations with plaintiff's officers looking to a discontinuance of the agency arrangement. The United States District Court for the Middle District of North Carolina, finds the service good because the defendant's representative "was such an agent of the corporation as would most assuredly bring notice to it if a process was served on him," and holds that the defendant was doing business in North Carolina at the time the process was served because it had then come "into this state through its duly authorized agent and discharged its sole distributor of its Ediphone products in the States of North Carolina and South Carolina, offered to buy the products remaining in the hands of plaintiff, and designated a new distributor for the same territory, and presumably intended to sell him those products." Carnegie Office Appliance Co. vs. Thomas A. Edison, Incorporated, not yet officially reported. Brooks, Parker, Smith & Wharton, of Greensboro, the plaintiff. King, Sapp & King, of Greensboro, for defendant.

Oklahoma.

Provision must be made for notice to foreign corporation of service of process on Secretary of State in action against it. The plaintiff in error here is a Kansas corporation engaged in the milling of flour. For some years it owned grain elevators in Oklahoma in

charge of men who, on a commission basis, purchased wheat on its account from farmers, stored it temporarily, and eventually shipped it to the corporation in Kansas. Action is on account of the sales price of wheat alleged to have been thus sold to the corporation and for which payment had not been made. The corporation was not licensed to do business in Oklahoma and had appointed no agent for service of process. Service was on the Secretary of State who gave no notice to the corporation. Sections 5436 and 5442, Compiled Oklahoma Statutes, 1921, authorizing service on the Secretary of State in case (inter alia) a foreign corporation doing business in the state has appointed or designated no agent for service of process, make no provision for the giving of notice to the corporation by the Secretary. The corporation entered a special appearance (having been advised of the action by a friend), to move the quashing of the service since, as it alleged, it was not and had not been engaged in business in Oklahoma, and because it had received from the Secretary of State no notice of the service of process on him, and thereafter, such motion having been denied, appeared generally but raising the jurisdictional question at every step of the proceedings throughout the trial. The Supreme Court of Oklahoma (260 P. 745), affirmed the judgment below for the plaintiff saying "that the plaintiff in error was doing business in the state of Oklahoma, within the purview of the subject matter before us, is beyond any reasonable doubt," and holding the service good. Certiorari having been granted by the United States Supreme Court that court on October 15, 1928 reversed the judgment below, per curiam. Readers will remember that in the Richardson case (see The Corporation Journal, April, 1928, page 162) the United States Supreme Court granted the petition for a writ of certiorari because, referring to the holding below in connection with these same sections of the Oklahoma statutes that the Secretary of State was under no duty to send notice of the summons, it was of the opinion "that the constitutionality of the statute concerning service, as so construed, was questionable, and that the question of its validity was one of general importance." However, as it developed, the court had no occasion to decide the question in that case. The force of the present per curiam decision is then, no doubt, that provision must be made for giving notice to the corporation by the Secretary of State, or other official, in such cases since notice and an opportunity to be heard are essential elements of due process of law. The Consolidated Flour Mills Co. vs. A. Meugge, et al, U. S. Supreme Court, October 15, 1928.

Utah.

Noncomplying foreign corporation may plead the statute of limitations in bar of an action against it. It is not essential to go into the merits in the instant case. Action is to enforce collection of certain claims by the assignee thereof; in addition to denying liability the defendant pleads the statute of limitations in bar of the action. It is contended that as defendant is a foreign corporation doing business in Utah without having complied with the laws relating to foreign corporations it may not plead the statute. The Supreme Court of Utah, reversing the judgment below holds that the action is barred saying:

"As the statute, section 947 [Compiled Laws of Utah, 1917,—section as amended in 1919], does not prohibit a foreign corporation from defending an action brought against it, and as no exception is made in the statute of limitations depriving non-complying foreign corporations of the right to plead such statute, it would seem to follow as a necessary corollary from what has been said that such corporations have the right to plead the statute the same as natural persons and corporations which have complied with the law. * * * it would seem that such corporation is entitled to such defense, where there is no express statute withholding the right." Clawson vs. Boston Acme Mines Development Co. et al., 269 P. 147. P. G. Ellis, of Salt Lake City, for appellants; P. C. Evans and E. A. Walton, both of Salt Lake City, for respondent.

Washington.

On the right of a stockholder to examine the corporation's books when such are kept in a foreign jurisdiction wherein the corporation does no business. This is an action in mandamus by a stockholder to compel the defendants as officers of an Idaho corporation which does no business in Washington but maintains an office and keeps its books there to inspect its books and to make copies of such portions as may seem to him to be desirable. The Supreme Court of Washington affirms the judgment below in favor of the plaintiff. It was urged that for the courts of Washington to compel the officers to permit an inspection in Washington of the books of a foreign corporation at the instance of a stockholder under the circumstances as stated is to violate the rule that a state will not interfere with the internal affairs and management of a foreign corporation. The court holds that the application of the generally accepted rule, that the courts of a foreign jurisdiction wherein the books of a corporation are kept are not precluded from enforcing a stockholder's right of inspection simply because the foreign corporation does no business in the state where the books are kept, does not interfere with the internal affairs of the corporation as to its powers, finances, or management. The laws of Idaho are mandatory on the right of a stockholder to inspect and copy the records of his corporation regardless of motive. Herman vs. Goodsell et al., 270 P. 297, John L. Dirks and Barker & Barker, all of Spokane, for appellants. Ed. B. Powell, of Spokane, for respondent.

Taxation

California.

Franchise tax on domestic and foreign corporations based on net income. The proposed amendment of the California constitution, referred to in The Corporation Journal of November, 1928, page 282, giving the power to the Legislature to impose a franchise tax on business corporations doing business within the limits of the state, on the

basis of net income, such tax to be in lieu of the present tax on corporate franchises, was adopted by the people at the polls on November 6, 1928. The California legislature convenes in regular session on January 7, 1929.

Connecticut.

Excessive real estate tax voluntarily paid to save interest pending court's determination of assessed valuation cannot be recovered. Local real estate tax is involved. The value placed on the property by the assessors was excessive in the opinion of the corporation owner. Appeal was made to the board of relief without success, whereupon the matter was taken to the superior court. While the case was pending a tax bill was sent to the corporation based on the assessment; this was accompanied by a notice that if the tax was not paid on or before a certain date interest at the rate of 9% from an anterior date would be added. The corporation in order to save interest, "guessed" what the finding of the court would be, computed the tax on that amount and paid the tax so computed. The valuation so guessed was less than that determined by the assessors, but, as was later developed, was considerable greater than that found by the court. Action is to recover the amount of excess tax paid. The Supreme Court of Connecticut reverses the judgment below for the plaintiff, finding that the payment was made voluntarily and that there was no duress, fraud, accident, or mistake, and so that the overpayment cannot be recovered though its collection was unenforceable and illegal. H. E. Verran Co. vs. Town of Stamford, 142 Atl. 578. Thomas J. Ryle, of Stamford, for appellant. Raymond E. Hackett, of Stamford, for appellee.

Florida.

Law providing for court docket fees, proceeds to be used in establishing and maintaining county law libraries held unconstitutional. The act involved is Chapter 12004, Florida Laws of 1927. "It provides that in all counties coming within the purview of the act the clerk of the circuit court and the clerk of the civil court of record shall be paid upon the institution of any and all suits in chancery and in any and all suits at law in which the amount or value in controversy shall exceed $500 a docket fee of $10 in each case, which fee is required to be paid by the plaintiff upon the institution of the suit." Though denominated a "fee" the Supreme Court of Florida, in affirming the judgment below, holds the required payment to be a tax. The total amount of the fee is turned over to the county to be used for county purposes—the establishment and maintenance of a law library in the county; no part of it is appropriated for the payment of any services rendered by the clerk. The Court says: "The provisions of the above-quoted act of the Legislature are clearly repugnant to this section [§4] of the Bill of Rights" which section reads as follows: "All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and

justice shall be administered without sale, denial, or delay." The North Dakota case of Malin et al. vs. La Moure County, 145 N. W. 582, construing a similar statute is cited and quoted from with approval. Flood, Clerk vs. State ex rel. Homeland Co., 117 So. 385. Bart A. Riley, A. B. & C. C. Small and Price, Price, Neeley & Kehoe, all of Miami, for plaintiff in error. Carl T. Hoffman and L. L. Robinson, both of Miami, for defendant in error.

Illinois.

Franchise tax on foreign corporations held to be constitutional. The Illinois statutes provide (Sec. 105, of the Corporation Act) for an annual license fee or franchise tax on a qualified foreign corporation equal to 5c on each $100 "of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located" in Illinois, such fee or tax however in no case to be less than would be required under the section of the statutes (Sec. 107, of the Corporation Act) providing for the imposition of a franchise tax on foreign corporations doing business in the state but having no property therein. The latter section imposes a graduated fee or tax on a bracketed sliding scale basis the amount thereof being dependent on the amount of the issued capital stock, with a maximum of $1,000 in the case of a corporation with issued capital in excess of $20,000,000. The plaintiff here, having a large capitalization, but doing little business in Illinois and having but a small amount of property therein would be subject to a tax for the year 1927 of $135.21 under Sec. 105 except for the proviso that its tax is not to be less than as computed under Sec. 107. Under Sec. 107 its tax is $1,000 (as it is in the "excess of $20,000,000" bracket), and a tax in that amount was assessed against it. Plaintiff claims that the Illinois statute unreasonably interferes with interstate commerce, denies to it the equal protection of the law, and deprives it of property without due process. The United States District Court, Southern District of Illinois, Southern Division, denies the force of any one of the claims and grants the defendant's motion to mismiss. St. Louis Southwestern Ry. Co. vs. Emmerson, Sec'y. of State of Ill., 27 F. (2d) 1005. Whitnel & Browning, of East St. Louis, for plaintiff. Oscar E. Carlstrom, Atty. Gen. (B. L. Catron, Asst. Atty. Gen., of Counsel), for defendant.

Kentucky.

Tax on sale or use of gasoline is an excise tax rather than a tax on property and may be imposed though the gasoline is used in interstate commerce. Section 4224b1, Kentucky Statutes, Baldwin's 1926 Supplement, provides for a tax of 5c per gallon on gasoline or other fuel oil sold in Kentucky at wholesale. "At wholesale" is defined so as to include "any person who shall purchase or obtain such gasoline without the state and sell or distribute or *use* the same within the state." The defendant-appellant is a partnership, the members being citizens and residents of Illinois in which state the principal place of business is located. The business engaged in is the operation of a

ferry between points in Illinois and Kentucky. It is conceded that 95 per cent of the gasoline, all of which is purchased in Illinois, is used in Kentucky. Action is by the state for the tax under the statute referred to above. The principal ground on which the validity of the tax is assailed is that it is a tax on property and so violates § 171, the uniformity clause of the State Constitution. The Court of Appeals of Kentucky, citing many cases and quoting at length from several, holds the tax to be an excise and so not violative of such clause. Another contention is that the commerce clause of the Federal Constitution is violated because the oil is used in interstate commerce solely. The court does not agree with this contention, saying, numerous decisions being cited: "It is well settled that there is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction." And further: "In view of these decisions we are not prepared to say that the mere use of property in interstate commerce places it beyond the state's power to tax it." There is no discrimination as the tax is the same on all oil whether used in interstate or intrastate commerce. Metropolis Ferry Co. vs. Commonwealth, 7 S. W. (2d) 506. Wheeler & Hughes, of Paducah, for appellant. W. A. Berry, of Paducah, for the Commonwealth.

Massachusetts.

Inclusion of interest on United States and county and municipal bonds in net income constituting measure of annual excise tax on domestic corporations is upheld. By the Massachusetts law (G. L. Ch. 63, as amended by Stats. 1922, Ch. 424) an annual excise tax is imposed on domestic corporations for the privilege of exercising their franchises measured in part by so much of the net income as defined by the statute as is derived from business carried on within the commonwealth. The statute prescribes that the net income shall be that required to be returned for Federal income tax purposes plus (inter alia) all interest not so required to be returned. So, interest on United States and Massachusetts county and municipal bonds is included in the determination of "net income." It was contended that to this extent the taxing statute is invalid. The Supreme Judicial Court of Massachusetts upholds the provision saying that the tax is a pure excise, and is not a tax on property or on the income therefrom, and, citing the many authorities and advancing the many well known arguments, holding that there is no objection to including such interest in determining the net income which, in part, is the measure of the excise. The Macallen Vo. vs. Commonwealth, 163 N. E. 75. T. Allen, for the petitioner. R. C. Cutter, Assistant Attorney General, for the respondent.

Delaware Corporations Organized.

546 corporations were organized under the laws of Delaware from October 21 to November 20, as against 386 for the preceding 30-day period, and 443 for the corresponding period of one year ago.

Some Important Matters for December and January

ALASKA—Annual Corporation Tax due on or before January 1—Domestic and Foreign Corporations.

ALABAMA—Annual Application Fee for permit to do business due February 1—Domestic and Foreign Corporations.

CONNECTICUT—Annual Report due on or before February 15—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20—Domestic Corporations.

INDIANA—Annual Report due during January—Foreign Corporations.

KENTUCKY—Annual Report due on or before February 1—Domestic and Foreign Corporations.

LOUISIANA—Annual Report due on or before February 1—Domestic and Foreign Corporations.

MISSOURI—Return of Information at Source due on or before February 1.—Domestic and Foreign Corporations.

NEW YORK—Annual Franchise Tax based on Income of Business Corporations due on or before January 1.—Domestic and Foreign Business Corporations other than realty and holding companies.

Annual Franchise Tax Report, Real Estate and Holding Corporations, due between January 1 and February 15.—Domestic and Foreign Corporations.

OHIO—Report to Industrial Commission due during January.—Domestic and Foreign Corporations.

SOUTH CAROLINA—Annual Statement due on or before January 31.—Foreign Corporations.

UNITED STATES—Fourth Instalment of Income Tax imposed for the calendar year 1927 due on or before December 15.

UTAH—Corporation License Tax due between November 15 and December 15.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

Some Legal Questions in Relation to Investment Trusts. A discussion of their validity, taxability, distinction between "trust" and "association," with citations of leading court decisions and decisions of the U. S. Board of Tax Appeals, and their treatment under the New York State Income, Inheritance and Stock Transfer Taxes.

What Constitutes Doing Business. (Revised to July, 1928). A pamphlet containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business."

Six Points to Watch in Incorporation. A valuable reminder for attorneys when planning a corporate structure or drafting incorporation papers.

Two Notable Certificates of Incorporation. Certificate of Standard Oil Company of California, and that of Tide Water Associated Oil Company.

Certificate of Incorporation of Pullman Incorporated. Pullman Incorporated was the first internationally known corporation to take advantage of the new features of the Delaware law as amended in 1927, and its charter will therefore be of great interest to lawyers.

Safeguarding Stock Transfers. Dealing with the many pitfalls in transferring stock on a corporation's books.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation. Revised to January, 1928.

When Doing Business Is Illegal. A brief discussion, illustrated by many actual examples taken from the court records of various states, of the difference between "Interstate" and "Intrastate" business.

Special Reports. When cases are decided that seem to be of some particular interest or significance in connection with the matter of doing business by foreign corporations, The Corporation Trust Company sometimes issues one of these special reports. Two are now available—one on the Richardson case, and one on the Southwest Company case.

Transfer Requirements Chart. This supplement to The Stock Transfer Guide and Service shows the classifications into which requests for stock transfers are divided and how the principal requirements for each classification may be determined, either by the transfer agent or the individual desiring transfer made.